

A unique event in Scottish legal history did not take place in Edinburgh's Court of Session last Thursday. Mr Pat McCrystal has mesothelioma and in August was given four months to live. The incidence of this horrific asbestos disease in Glasgow is nearly 8 times the UK average but diagnosis is not straightforward; the real figure will be higher. The latency period of mesothelioma can be as long as 50 years. He caught 'the bug' while working on Clydeside and is one of the 20,000 shipyard workers known to have caught asbestos diseases since the end of the 2nd World War. Mr McCrystal had taken his former employers to court and intended seeing the case through to the bitter end. This proved impossible. His life and imminent death were settled against his wishes in an out-of-court deal.

In Mr McCrystal's opinion he was browbeaten into the financial settlement, rendered powerless by what has been described as 'legal blackmail'. He and his fellow members of Clydeside Action on Asbestos (90% of whom are victims of asbestos-related disease) were prepared for the worst. The majority have their own cases in process; the system grinds along for 4 to 8 years, until the inevitable out-of-court settlement.

Mr McCrystal rejected the first offer of £18,000, then the second of £22,000. The money increased to £50,000. Again he declined, the money was immaterial; he sought 'justice' rather than financial compensation. Two days before the hearing he travelled to Edinburgh for a meeting with his union lawyer and QC. It lasted 2 hours. £50,000 was the best he could hope for. He stressed that by 'justice' he meant to make public the full guilt of his former employers, that their guilt might become subject to some form of court ruling. This both could aid and, by extension, lead to the prevention of other asbestos victims. The fight was never on his own account but for thousands of workers who suffer, and will continue to suffer, a fate similar to his own. This was why he required the case heard in court.

It was explained to him that civil actions were about money. If he wanted justice he should 'go to Parliament'. The court was not the place for 'feuds' (a strange legal euphemism for an action based on the proposition that a person has been infected by

¹ Published in The Glasgow Herald under my own name, stating that this was my personal account of the proceedings

a deadly fibre through the irresponsibility of others). Mr McCrystal remained adamant.

The day before the scheduled hearing he was asked the settlement sum he had in mind. Since £100,000 had been filed for originally by the lawyers he suggested they ask for that. He regretted mentioning a figure at all but felt tired, the pressure was getting to him. It turns out the £100,000 was a sort of nominal sum; to ask this in real life was outwith the bounds of reason.

At this stage the particulars of the compensation figure were still being worked through line by line and £1 for £1. Mr McCrystal did mention in passing a full six months had elapsed to conduct this business. In view of his advanced terminal condition, coupled with the current mental stress, he was no longer in the best state to deal with it.

The court hearing was scheduled for 9.45 a.m. on 24.9.92. At 6.30 a.m. his lawyer phoned for more information, again asking what sort of sum of money he had in mind. He replied firmly that he was 'going to court'. And had he planned his travelling arrangements? Yes, he would go by road with his niece and a group of friends and fellow asbestos victims.

In the main hall at the Court of Session the negotiations moved up a gear. Two unfortunate factors had cropped up that could entail a reduced in-court award. Thus the out-of-court £50,000 on offer seemed very fair. As a bonus the Defenders would disclose liability. It was also suggested that the media's interest in Me McCrystal was not especially helpful. Finally, the settlement was to be announced in court. So although 'out' the settlement might be said to be 'in'. Thus would Mr McCrystal have won his victory.

Mr McCrystal had difficulty in grasping the nature of this 'victory'. Was it 'in' or 'out' of court? Well, technically it was 'out'.

He then declined this latest offer and his lawyer departed for further consultation with the QC. Mr McCrystal and other asbestos victims now predicted the QC would threaten to withdraw from the case; also that the union lawyer might be obliged to do likewise.

A short time later the lawyer returned with 'astonishing' last-minute news: if the latest out-of-court settlement was rejected the QC must withdraw from the case. This action lay outwith the lawyer's personal experience (even although Mr McCrystal and the other victims present had predicted precisely this course of eventse).

The practice is not uncommon. A couple of months ago a fellow asbestos victim, having expected £70,000, settled for less than £10,000 when faced by a similar ultimatum.

Could another counsel be hired? Most unlikely. Also, although the lawyer was acting for Mr McCrystal his union funded the case. Advised that the in-court award might prove smaller than the out-of-court the GMB could be forced to withdraw if it was refused. (The union receives 10% of the final sum.) But surely Mr McCrystal's union would support the battle for a full court hearing on a matter of such unprecedented importance for the Scottish trades union movement? No, such an attitude couldn't be taken for granted. Could Mr McCrystal pay costs himself? Well, these were fairly high, even the calling of witnesses - doctors, for example, were 'expensive'. Then the lawyer left to clarify the position with the GMB.

For the past two days Mr McCrystal had talked with his friends on the probability of being abandoned. C.A.A. is self-supporting, funded almost exclusively by its own members and sympathisers; it survives from month to month. Could the money be raised in the event of the GMB lawyer's withdrawal? Could one of the members present the case on behalf of Mr McCrystal? Would 'they' allow it? Such things are possible in criminal law but what about civil law? Expert advice seemed crucial. But where to turn?

Now the irony of the situation: being in the vast hall of the Court of Session, surrounded by the silks and gowns of the legal profession, yet the possibility of requesting legal advice was advanced only as a joke, when an asbestos victim spotted the Dean of Faculty in a conversational stroll with a colleague.

It was evident Mr McCrystal was very tired. Given the inner strength that has sustained this courageous, dignified man there remains the physical reality of mesothelioma: each and every breath is a fitful struggle: asbestos victims experience progressive lung death. To pursue 'justice' now the only plausible action was to request a new hearing. This would allow time for some realistic alternative.

Enter the 'Scottish' factor: the *Effect of Death on Damages*. Bearing in mind that ALL asbestos-related diseases are incurable, this final reality is confronted by every last Scottish victim. Mr McCrystal reminded the group he would be dead quite soon, thus the bulk of the claim would die with him. He confessed defeat.

The was instructed to inform Mr Graham Fleming QC that he need not withdraw

from the case, the 'out-of-court' settlement had been reached. And at 11.45 a.m. the court assembled to hear the announcement.

Counsel for the Pursuer asked for it on record to the effect that his client was a courageous man.

Counsel for the Defenders countered to the effect that his clients had shown consideration of the Pursuer's physical condition by allowing this early hearing.

The only thing unique about last Thursday's events in Parliament Square, Edinburgh was the speed by which the court appearance was scheduled, which may have had something to do with the media's interest in Mr McCrystal.² An 'unknown' mesothelioma victim has his case scheduled for December, having been diagnosed even earlier than Mr McCrystal.

There are many questions that demand attention in respect of 'justice' and the victims of asbestos. What must not be ignored by the public is the disclosure of liability. Some famous Clydeside shipbuilders have admitted their failure to implement adequate precautions which might have safeguarded the lives of their employees. A look at the history of asbestos abuse quickly establishes that there was no excuse. The British government itself was aware of the terrible dangers back in 1898 when factory inspectors were concerned about 'the evil effects of asbestos dust'. Ten years later 'a Parliamentary Commission confirmed the first cases of asbestos deaths in factories and recommended better ventilation and other safety measures'. 40 years on nothing was done. In cases that have come to light recently many employers still behave with reckless abandon.

The fight for justice also has a long history. 1929 saw 'the world's largest asbestos corporation, the US-based Johns Manville, served with writs by 11 asbestos victims'; the claims were settled out-of-court with 'secrecy orders'. In Scotland little has changed except this negotiated disclosure of liability. There seems no process in law by which guilty people can face trial for their blatant disregard of human life. For the victims of asbestos the first step towards justice is to take a case to court. At present this appears impossible.

On Thursday of last week the only victory belonged to the legal profession and the Defenders; and, indirectly, the asbestos industry itself. Meanwhile Pat McCrystal survives and continues the fight. He is very tired but also angry. The victims of

² A BBC2 "Newsnight Special" had featured the case

asbestos will persist with their 'feud' against those responsible, whether by act or omission, for their imminent death by industrial disease. Members of the legal profession will regard them as naive.